In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 928

LOUIS J. GNOTTA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner has been employed as a Cartographic Aide, Grade GS–7, by the Department of the Army, Corps of Engineers, Kansas City District, since 1955 and has never been promoted (Pet. A4). He claims that his non-promotion resulted from discrimination against him because of his Italian ancestry, in violation of Executive Order No. 11246, which declares that it is the policy of the United States to prohibit discrimination in federal employment because of race, creed, color, or national origin (Pet. A1). After a hearing on his complaint, the Army's Equal Employment Opportunity Officer held that the evidence did not substantiate the allegation of discrimination, and

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the Board of Appeals and Review of the Civil Service Commission affirmed this decision (Pet. A5–A6).

Petitioner then commenced an action in the district court against the United States, the Civil Service Commission, the Department of the Army and individual employees of the Corps of Engineers (Pet. A2). He sought (1) review of the Civil Service Commission's decision; (2) a writ of mandamus to compel compliance with Executive Order No. 11246; and (3) damages of $10,000 (Pet. A2). The district court dismissed the complaint for "want of proper jurisdictional allegations" (Pet. 6). The court of appeals affirmed, on the ground that the named defendants were immune from suit (Pet. A9–A12).

1. With respect to the non-damage claims, the court of appeals correctly held that petitioner named the wrong parties defendant. *Blackmar* v. *Guerre*, 342 U.S. 512, squarely held that an action for judicial review of action on government personnel is not properly brought against either the Civil Service Commission or the employee's supervisors. Nor, as the court of appeals pointed out, is the Department of the Army a suable entity. Finally, mandatory relief may not be obtained against the United States in cases of this type, since there is no statute authorizing it.[1] The proper parties defendant in this case, for

[1] These conclusions are not affected by 28 U.S.C. 1343(4), which grants the district courts jurisdiction "of any civil action authorized by law" to recover damages or to secure equitable relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." The statute does not deal with the problem of proper parties defendant. Moreover, Executive Order No. 11246, the alleged violation of which is the gravamen of petitioner's case, is not an "Act of Congress."

purposes of mandatory relief, were the individual Civil Service Commissioners, who could have been sued in their official capacity in the district court under 28 U.S.C. 1391(e). Nothing in the decision of the court of appeals would prevent petitioner now from suing the Commissioners in the district court under 28 U.S.C. 1391(e).[2]

2. In any event, on the merits petitioner is not entitled to relief. As the court of appeals noted (Pet. App. A4–A5), several witnesses testified that there was no discrimination against Gnotta or against Italians generally in the Corps of Engineers.[3] Assuming that a failure to promote is reviewable, this evidence was sufficient support for the finding of no discrimination. And in view of the support in the record for this finding, it is not necessary to reach the question of whether an action for damages lies against the United States for discriminatory failure to promote.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[2] 28 U.S.C. 1391(e) permits suit against federal officers in their official capacity, in the district where the cause of action arose. Petitioner was employed in the Western District of Missouri, where this suit was brought. *Blackmar* v. *Guerre* was decided before the passage of 28 U.S.C. 1391(e), at a time when suit against the individual Civil Service Commissioners could only be brought in the District of Columbia.

[3] The testimony of the witnesses referred to by the court of appeals is set forth in summary narrative form at pp. 25–35 of the appendix filed by appellant in the court of appeals.

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